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No. 90-5635

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

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SUPREME COURT, U.S.

JOHN J. MCCARTHY,

Petitioner

v.

GEORGE BRONSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondents urge the Court to deny review on two grounds. First, they contend that, in light of the broad allegations in petitioner's complaint, the question whether a single episode of unconstitutional conduct qualifies as a "condition[] of confinement" within the meaning of 28 U.S.C. § 636(b)(1)(B) is not squarely presented. Second, they suggest that the intercircuit conflict on this issue is "illusory." Br. in Opp. 2. Neither argument has merit. Because this case directly presents a question of recurring importance to the disposition of prisoner litigation in the federal judicial system, and because the courts of appeals are sharply divided on that issue, the Court should grant the petition for certiorari.

1. Respondents' principal contention is that McCarthy's second amended complaint alleged "far more than one specific episode of alleged unconstitutional conduct," and that, accordingly, the case was properly referred to the magistrate even under petitioner's reading of section 636(b)(1)(B). Br. in Opp. 2 & 8. In support of this argument, respondents suggest that the complaint should be interpreted as mounting a broad challenge to, e.g., the prison's "practices and regulations with regard to [McCarthy's] placement in segregation," the sufficiency of the prison's written policies regarding the use of force (including chemical weapons) on inmates, and the adequacy of the medical treatment petitioner received after the incident. Id. at 2-6.

Respondents' interpretation, which elevates certain factual assertions in petitioner's pro se complaint to the status of independent claims, is simply incorrect. As even a cursory review of the complaint reveals, virtually all of the "claims" respondents purport to find are merely factual allegations included either (1) as part of petitioner's comprehensive account of the events underlying his claim, or (2) because they pertain directly to his central contention that he was subjected to unconstitutionally excessive force on a single occasion. See Magistrate's Recommended Findings of Fact and Memorandum of Decision, Br. in Opp. App. 5, at A25-26 (setting forth Second

Circuit's four-prong test for determining whether force was excessive). For example, rather than challenging prison policies "with regard to his placement in segregation," Br. in Opp. 2, the complaint merely alleges that McCarthy was placed in administrative segregation as a result of the disciplinary infractions that occurred on the date of the incident. Second Amended Complaint ¶¶ 53, 55, Br. in Opp. App. 9, at A53.[1] Similarly, petitioner's allegations regarding the medical attention he received after the July 13, 1982 incident -- far from being a broad challenge to prison medical conditions -- are included only because of their relevance to damages from the alleged assault.

Moreover, to the extent that the legal claims contained in McCarthy's complaint can be read as broader than an allegation of a single incident of excessive force, a pretrial ruling specified that the only issue to be joined at trial was whether "defendants violated his constitutional rights when they sprayed him with 'Big Red,' a chemical weapon similar to mace." Br. in Opp. App. 7, at A34; see also id. at A37 (petitioner's complaint "set[s] forth the constitutionality of the use of mace as the issue to be resolved"). Thus, even if the complaint somehow

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1 The reference to being placed in segregation may also bear on his claim that that he was inappropriately denied good time credits. See Br. in Opp. App. 9, at A53. That claim: (1) was effectively eliminated from the case in a pre-trial ruling by the district judge, see Br. in Opp. App. 7, at A34-37; (2) was not even alluded to in the magistrate's opinion; and (3) in any event, does not constitute a challenge to "conditions of confinement."

could be construed to contain more broad-based claims, they were neither pursued by petitioner nor adjudicated by the magistrate.[2]

In light of these events, it comes as no surprise that the interpretation of petitioner's complaint urged by respondents has been rejected by all of the judicial officers who have reviewed this case. Both the magistrate and the district judge, as well as a unanimous panel of the court of appeals, understood petitioner's complaint and lawsuit to involve a single, specific incident of unconstitutional conduct. See Magistrate's Recommended Findings of Fact and Memorandum of Decision, Br. in Opp. App. 5, at A12; Ruling on Pending Motions (Dec. 22, 1986) (per Cabranes, J.), Br. in Opp. App. 8, at A37; McCarthy v. Bronson, 906 F.2d 835, 837-39 (2d Cir. 1990). Because the record fully supports that conclusion, the question whether challenges to such incidents fall within the jurisdictional grant of 28 U.S.C. § 636(b)(1)(b) is squarely presented in this petition.

2. Equally unfounded is respondents' contention that the division in the courts of appeals on this issue is "illusory."

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2 Six of the seven numbered paragraphs in the "legal claims" section of petitioner's complaint, see Second Amended Complaint ¶¶ 61-67, Br. in Opp. App. 9. at A54, concerned the excessive-force claim. The seventh, paragraph 63, alleged a due process violation based on loss of good time credit, which, as noted above, was neither pursued by petitioner nor adjudicated by the magistrate. See supra note 1. In his prayer for relief, petitioner did request an injunction requiring the defendants to develop "[d]irectives restricting the use of Tear Gas and the . . . Tear Gas Duster . . . ." Br. in Opp. App. 9, at A55. That request, however, cannot fairly be read as reflecting an independent challenge to prison policies and procedures. To the contrary, read in the context of the whole complaint, that relief was requested as a means of protecting McCarthy from any future assaults of the nature suffered on July 13, 1982.

Br. in Opp. 2. Indeed, even under their cramped interpretation of the case law, respondents are forced to acknowledge a clear split of authority on the meaning of section 636(b)(1)(B), with the Tenth and Second Circuits taking diametrically opposed positions on whether "conditions of confinement" include challenges to specific episodes of unconstitutional conduct. Id. at 8. Compare Clark v. Poulton, 914 F.2d 1426, 1439-40 (10th Cir. 1990) with McCarthy v. Bronson, supra, 906 F.2d at 839. In point of fact, as the courts of appeals themselves have acknowledged, the division is considerably more widespread than that, with at least five circuits having taken sharply divergent views on the question. See, e.g., Clark v. Poulton, supra, 914 F.2d at 1429 (noting that five other circuits had addressed the issue); id. at 1434 & n.1 (Anderson, J., dissenting) (acknowledging a 2-2 split on the issue); McCarthy v. Bronson, supra, 906 F.2d at 839 (setting out majority and "minority" views); see also Houghton v. Osborne, 834 F.2d 745, 749 (9th Cir. 1987) (in case pre-dating contrary Eighth and Second Circuit decisions, adopting reading of § 636(b)(1)(B) urged by petitioner and noting that the Fourth and Eleventh Circuits had also so held).[3] As these decisions make clear, the question presented in

3 Respondents' efforts to distinguish these cases, or otherwise diminish the extent of the circuit split, are unconvincing. Thus, for example, they contend that Clark is distinguishable because (1) the prisoner there never consented to trial before a magistrate and (2) the applicable local rule did not authorize reference of civil cases to a magistrate. Br. in Opp. 7-9 & n.4. With respect to the former, the distinction is entirely ephemeral, since McCarthy's initial consent was formally vacated and therefore no longer has any legal effect. With respect to the latter, respondent fails to point out that civil trials are referred to a magistrate under § 636(c). See also Clark v. Poulton, supra, 914 F.2d at 1431 n.6. Thus, as Clark itself demonstrates, the absence of a local rule implementing that provision has no relevance to references under § 636(b)(1)(B). Similarly, any restrictions the local rules place upon references of pretrial matters under § 636(b)(1)(A) would have no effect on the reference of prisoner petitions under § 636(b)(1)(B). See id. (citing District of Utah Local Rules 9(d) & (i)).

Equally unconvincing is respondents' suggestion that Hill v. Jenkins, 603 F.2d 1256 (7th Cir. 1979), has been undercut by later developments. See Br. in Opp. 5 n.2. The opinion for the court in Hill cited the Seventh Circuit's Raddatz decision only to distinguish it, and Judge Swygert's separate concurrence advancing his influential reading of section 636(b)(1)(B) did not even cite Raddatz. See 603 F.2d at 1259-60.

this petition continues to divide the courts of appeals. For that reason, and because the issue has great practical importance to the appropriate resolution of a large number of prisoner lawsuits in the federal courts, the Court should grant the petition for certiorari.[4]

4 While this is not the appropriate occasion for addressing the underlying merits, respondents' assertion that the Fourth, Ninth, Tenth, and Eleventh Circuits' reading of section 636(b)(1)(B) "leads to absurd results" is well wide of the mark. Br. in Opp. 9 n.6. This contention suffers from at least three critical flaws: (1) it erroneously focuses on the respective competence of magistrates to hear claims based on specific episodes as opposed to claims challenging widespread conditions, ignoring the unavoidable inference to be drawn from 28 U.S.C. § 636(c) that Congress believed magistrates were capable of hearing both types of claims -- but only when the parties consented; (2) it falsely assumes that cases challenging widespread conditions are always or at least usually more important than cases involving specific episodes of unconstitutional conduct, whereas in fact many conditions cases involve frivolous claims; and (3) it simply overlooks other reasons why Congress might have drawn the line where it did in section 636(b)(1)(B). Other plausible explanations for Congress' excluding claims like petitioner's from section 636(b)(1)(B) include: (a) Congress failed even to consider the distinction urged by petitioner, in which case the clear language of the statute should govern and require reversal in this case; (b) Congress believed that the modern generation of conditions cases involved, as a group, claims that were generally less meritorious than those advanced in cases involving specific episodes of unconstitutional conduct; (c) Congress was worried about the feasibility and mechanics of obtaining consent under section 636(c) in class actions challenging widespread prison conditions, and therefore provided a mechanism for non-consensual

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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reference of such cases under section 636(b)(1)(B); and (d) Congress believed that lawsuits challenging widespread prison conditions were creating an inordinate drain on judicial resources, and that this was an area where magistrates -- by holding evidentiary hearings, touring prison facilities, and taking the extensive testimony sometimes involved in these cases -- could significantly lighten the workload of federal judges. Any one of these reasons would adequately explain why Congress, in enacting section 636(b)(1)(B), meant what it said.

CERTIFICATE OF SERVICE

As a member of the bar of this Court, I hereby certify that one copy of Petitioner's Reply Brief in support of his petition in McCarthy v. Bronson, No. 90-5635, was served by first-class mail this 26th day of November, 1990, on the following:

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